The Maritime Labour Convention 2006- a Long-Awaited Change in the Maritime Sector

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Abstract

The article aims at analyzing a reference legal instrument for seafarers’ rights – the Maritime Labour Convention 2006. Created due to the lack of relevance of the body of international labour standards in the maritime sector, the Convention lays down in its regulations a firm set of principles and rights for an entire global industry. Maritime Labour Convention is intended to complement three key maritime conventions, SOLAS, MARPOL and STCW as well as to become the fourth pillar of an international regulatory regime for quality shipping. It is internationally unique in that it aims both to ensure decent working conditions on board and a fair framework for ship-owners operating ships under the flag of States that have ratified the Convention. This article aims to highlight the innovative aspects introduced and in the subsidiary, to what extent the Convention resolves the challenges of implementing at the flag state level and also, the possible loopholes of it.

Keywords: Maritime Labour Convention 2006; seafarers’ rights; implementation; limitations;

1. Introduction

One of the first legal instruments adopted by the International Labour Organization was National Seamens Code Recommendation in 1920 calling for the adoption of an international seafarer’s code which set out rights and duties in this sector (Dürler, 2010). This moment marked the beginning of a vast legislative activity concerning the seafarers and included over 68 ILO Conventions and Recommendations (Dürler, 2010). The natural, technical and social risks in the maritime employment explain the necessity of adoption of special standards for the seafarers

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MLC is regarded as the best practical answer for the challenge posed by globalization (Payoyo, 2009). At the same word, the wording and the content of rights penetrates this instrument; fourthly, as a normative instrument in governance, the MLC is considered unprecedented in the history of the ILO activity: it covers in detail the entire spectrum of the maritime sector is described as one of the first internationalized or globalized sectors (McConnell, 2009). It presents a particular challenge for the legal system – workers coming from different countries working in places that move between jurisdictions and involve employer/ownership arrangements which are similarly fluid with related issues on extraterritoriality and challenges to the principle of state sovereignty which manifest themselves in the concept of flag state control (McConnell, 2009). The ILO activity was designed to provide an answer to the concern raised by a large number of commentators regarding the imbalances in the international commerce and the regime of the economic law and its failure to address the relationship between labour costs and trade (McConnell, 2009).

From a strictly legal perspective, what shipping industry has to call in question was the lack of relevance of the legal instruments adopted (Doumbia-Henry, Devlin & McConnell, 2006). They were uneven implemented and enforced and for many times their ratification regime was narrow (Doumbia-Henry et al., 2006). In addition, the review procedures in place at that time did not allow the technical issues to be quickly updated to meet modern shipping conditions (Doumbia-Henry et al., 2006). Taking into account the above mentioned issues, the Maritime Labour Convention (MLC 2006) neither represents just a simple consolidation of the body of international standards in the field of maritime labour nor just brings clarity or coherence of the numerous Conventions and Recommendations adopted from 1920 to present days (Doumbia-Henry et al., 2006).

Given the lack of compromise, in 2000, “the Joint Maritime Commission”, an advisory body within ILO launched a project named “The Geneva Accord” with the aim of bringing together all relevant ILO instruments – Conventions and Recommendations – in a single document (Dürler, 2010). In 2001, a High Level Tripartite Working Group was created (Dürler, 2010). Numerous negotiations have subsequently prepared the 2006 Diplomatic Conference which adopted a legal instrument considered as being a landmark of the seafarers’ rights (Dürler, 2010). The Convention consolidates over 68 previous normative acts (Payoyo, 2009).

2. The main features of the Maritime Labour Convention

The MLC is intended to complement the three key maritime conventions, SOLAS, MARPOL, STCW and to become the fourth pillar of the international regulatory regime in the maritime field (Doumbia-Henry et al., 2006). The MLC is regarded as a true achievement in the international regulatory policy for the following reasons: first, by the way of its form MLC combines both hard law and soft law approaches in a single legal instrument; secondly, from the perspective of the adoption of the treaty, MLC is an outstanding international agreement because it codifies labour standards for an entire maritime industry, it has received unanimous approval not only from the states but also from the governmental partners of this industry (Payoyo, 2009). It is designed to be internationally enforced and to be effectively implemented and it provides a continuous review mechanism of the MLC, including an expeditious introduction of the amendments to it; thirdly, ratione materiae, is genuinely a bill of rights because the wording and the content of rights penetrates this instrument; fourthly, as a normative instrument in governance, MLC is regarded as the best practical answer for the challenge posed by globalization (Payoyo, 2009). At the same time MLC is considered unprecedented in the history of the ILO activity: it covers in detail the entire spectrum of socio-economic problems in the maritime sector including the highly controversial issue of social security protection, liability of the ship owner and repatriation; it sets out a comprehensive system of compliance and enforcement based on the flag state inspections and the certification of the requirements of the Convention along with Port state inspections and response procedures for the onboard and on-shore level complaints (McConnell, 2009). Last but not least, MLC brings in a new format for the ILO Conventions (McConnell, 2009). MLC is special for other considerations, too. It does not have a number on account it shall be amended in the future and it is not replaced by other convention (Dürler, 2010).

The Convention has three underlying purposes: (a) to lay down, in its Articles and Regulations, a firm set of rights and principles; (b) to allow, through the Code, a considerable degree of flexibility in the way the Members implement those rights and principles; and (c) to ensure, through Title 5, that the rights and principles are properly complied with and enforced.
3. The EU and Maritime Labour Convention

EU was extremely active in the drafting stage of the Convention in order to ensure that current European laws, placed at a higher level, are projected onto the content of the MLC, to avoid the adoption of a convention not in line with the EU legislation (Tortell, Delarue & Kenner, 2009) and to ensure the compatibility with the Community acquis regarding the coordination of the social security systems (Christodoulou-Varotsi, 2009). The EU has gone further moving towards the introduction of European legislation to incorporate the Convention into EU law through sectoral directives, in cooperation with the social partners in the maritime sector (Tortell et al., 2009). The EU contribution was not only confined to legislative matters: it has provided financial assistance to ILO co-financing the ILC; it has harmonized the points of view of EU members during the adoption and amending process allowing for the adoption of an European point of view; it has provided the political will to support the Convention, with The Commission encouraging the ratification process among his members (Tortell et al., 2009).

4. The structure and content of the Maritime Labour Convention

From a structural perspective, the Convention follows a similar approach with IMOs STCW Convention (McConnell, 2009; Dürler, 2010). The MLC structure consists of 16 interdependent Articles, Regulations and a Code; all of them are complemented by an Explanatory Note designed to be a general Guide for the Convention. The Articles and the Regulations set out principles and fundamental rules as well as basic obligations for the states which have ratified the Convention. The 16 articles present aspects such as definitions and scope of application (Article II), fundamental rights and principles (Article III), seafarer’s employment and social rights (Article IV), implementation and enforcement responsibilities (Article V). Other articles stipulate on consultation with ship owners and seafarers organizations’ (Article VII), Special Tripartite Committee (Article XIII), amendments to the convention (Article XIV).

The definition of some terms of the article II paragraph 1(a)-(i) was much debated. According to the definition of the term “seafarer”, this means “any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies” (Article II paragraph 1 (f)); It’s an extremely broad definition comprising categories of employees that no longer exist such as those who are working in the cruise ship sector (McConnell, Devlin, Doumbia-Henry, 2011). In order to establish what categories of employees fall within the said term, the scope provisions for seafarer and ships must be considered (McConnell et al., 2011). The application of the MLC to certain categories of ships and workers is subject to national flexibility (McConnell, 2009). Concerns were also raised in connection with the definition of the term “ship” due to the lack of tonnage limitation as it usually happens in the vast majority of IMO conventions and in the absence of the exclusion of the ships used in domestic voyages (McConnell et al., 2011). Article III and IV are seen as the foundation of the seafarers bill of rights. Article III provides that each Member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the ILO fundamental rights to freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation.

Reported to the provisions of the Article III, what raises practical difficulties is the evaluation during port state control procedures of two aspects: the seriousness of the breach (in particular freedom of association and the right of collective bargain) and what may be considered a breach of the requirement of the Convention (including seafarers’ rights) (McConnell et al., 2011). It must be noticed that there is no term “seafarers’ rights” as such in the Convention (McConnell et al., 2011). Other challenges during Port State Control inspections are the lack of measures to detain in abuse of standards that cannot be physically determined such as excess of working hours (Dimitrova, 2010). In other situations ships, documentation may be easily falsified and sometimes the only way to detain incompliance with some labour standards is through inspection of documentation (Dimitrova, 2010).

The Article IV does not grant the seafarers a legal basis to bring a legal action against their own governments (Payoyo, 2009). Besides, the traditional dichotomy citizen versus state is difficult to apply. In the vast majority of cases the relevant government concerned is not the country of residence or nationality of the individual concerned but the state of registry or the flag state (McConnell et al., 2011). The seafarers have the opportunity to make
complaints either at the shipboard level with the possibility of having the ship arrested or at the level of international supervisory scrutiny and having the law of the country reviewed (McConnell et al., 2011).

Article V provides the legal foundation for the provisions related to compliance and enforcement of the Convention which are to be found in Title 5. According to Article V, each Member shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction. In addition, each Member shall establish sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such law violations.

A ship to which the Convention applies may be inspected, when it is in one of the ports of the other Member State, to determine whether the ship is in compliance with the requirements of this Convention (Article 4 paragraph 4). The challenges related to the flag state implementation are of different nature: challenges related to inspection system capacity that may be faced by states with large tonnage registry and challenges relating to legal implementation (and ratification) (McConnell, 2011). In the second category the difficulties lie in connection with specific sectors such as cruise ship industry or in connection with the exercise of national flexibility (McConnell, 2011).

LMC 2006 requires implementation so that the states that have not ratified the Convention do not receive a more favourable treatment (Article V paragraph 7) which will ensure the “leveling of playing field” for the ship owners. The sanctioning legal mechanism directly applicable will be Port State Control (Payoyo, 2009). The principle of non-favourable treatment, borrowed from IMO Conventions, assures that Port States monitor the compliance of the ships flying flags of convenience so that Flag States have an incentive to ratify and implement the Convention (Lillie, 2008). Last but not least, the Convention allows for flexibility on implementation of the provisions of Part A of the Code through national law and regulations which are substantially equivalent (Article VI paragraph 3 and 4).

According to the Article VIII, the Convention imposed very hard conditions demanding the entry into force for an ILO convention, 12 months after the date on which 30 States representing 33% of world tonnage have ratified it. The very high level necessary to ratify the MLC 2006 shows that the compliance and enforcement system established under the Convention requires extensive international cooperation to be effective (R.M.T., 2010).

Another significant innovation of the Convention was the introduction of a special accelerated procedure for amendment, different from any other existing procedure in the ILO Conventions (Dimitrova, 2010). Unlike the usual procedure of amendment contained in Article XIV, the Article XV addresses only to amendments to the Code and involves a rapid update of the technical parts of the Convention without requiring a revision of the Convention (McConnell et al., 2011). The formula, drawn from the IMO conventions is sometimes described as the “tacit acceptance procedure” (McConnell et al., 2011).

The Code contains the details for the implementation of the Regulations. It comprises Part A (mandatory Standards) and Part B (non-mandatory Guidelines). Part B of the Code facilitates the inclusion of the Recommendations and Conventions poorly ratified, without giving those instruments a higher status than they already have (Lillie, 2008). The Regulations and the Code are organized into general areas under five Titles: Title 1: Minimum requirements for seafarers to work on a ship; Title 2: Conditions of employment; Title 3: Accommodation, recreational facilities, food and catering; Title 4: Health protection, medical care, welfare and social security protection; Title 5: Compliance and enforcement.

Among the listed titles two contain key elements to the Convention. Title 2 includes a provision deemed to be essential for the LMC 2006 namely the obligation that every seafarer must have a seafarers’ employment agreement (SEA) which identifies the employer/ responsible ship owner and sets the minimum of information required in a SEA” (McConnell et al., 2011). This element supports the compliance and enforcement system under Title 5 and it is a valuable source of information for the flag state inspections (McConnell et al., 2011).

Title 5 sets for the first time a certification system for social and working conditions in order to bring them in line with the international maritime regulatory regime established by IMO conventions (McConnell et al., 2011). Ships flying the flag of a Member State must carry on board a Maritime Labour Certificate with validity of 5 years complemented by a Declaration of Maritime Labour Compliance. The Maritime Labour Certificate shall certify that the living and working conditions of the seafarers on the ship have been inspected and meet the requirements of national laws or regulations or others measures implementing the Convention. The Certificate is required for the ships of 500 gross tonnages or over, engaged in international voyages or operating from a port or between ports in another country. According to Appendix A 5-1, a list of 14 areas must be inspected before certification by the flag
states for the purpose of Port State Control. Other areas are indirectly certified as a consequence of SEA certification (id. e. entitlement to leave; repatriation; ship owner’s liability).

In the operation of flag state inspections, an innovative element is the recognition of the role of the Recognized Organizations (ROs) – mainly the classification societies. According to the Regulation 5.1.1. and Regulation 5.1.2., Standard A 5.1.2., ROs may carry out ship inspections and issue certificates. The flag state certification and inspection system is closely related with the verifications that take place under Port State Control. Pursuant to Regulation 5.2.1. paragraph 2, Port State Control inspectors must accept valid certificates from ships as a prima facie evidence of compliance with the requirements of the Convention (including seafarer’s rights). For justified reasons listed in Standard 5.2.1 paragraph 1, a more detailed inspection may be conducted. Guidelines for Port State Control Officers are a useful tool to support the verification process.

Of the three sets of responsibilities provided by the Title V, two of them, those relating to flag states and Port States responsibilities are considered traditional under the regulatory regime of the Law of the Sea, and the overall international maritime regulatory regime (McConnell et al., 2011). Through Title V it is also introduced a third form of maritime responsibility – labour supplying responsibilities (McConnell et al., 2011). Pursuant to Regulation 5.3, Member states have the responsibility to assure the implementation of the requirements under the Convention as pertaining to seafarer recruitment and placement and the social protection of its seafarers. The responsibility regarding to social protection refers both to seafarers who are nationals of that State and to those who are resident or are domiciled otherwise in the territory of that State.

Conclusions

The MLC 2006 introduces for the first time a unifying legal regime for the rights of the seafarers from the double perspective of labour law and international maritime law. At the same time it sets an all-embracing system of compliance and enforcement based on flag state inspections and certification of the requirements of the Convention complemented by Port State inspections and on board and on-shore complaint handling procedures. Many of its provisions are innovative elements such as the rapid actualization of the technical parts of the Convention, the introduction of a third form of maritime responsibility – labour supplying responsibilities or the recognition of the ROs role in the operation of the flag state inspections. Despite its innovative character, the level to which the enforcement of the Convention will result in a change of the working and the living conditions on board will remain an issue to be verified both in practice and in time. The harsh imposed ratification conditions were a reflection of the fact that the introduced system needs a broad international cooperation to be effective.

References


